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In The

Supreme Court of the United States

October Term, 1993

DAVID L. RAMSEY, Secretary,
Department of Health and Hospitals,
State of Louisiana, *et al.*,

Petitioners,

vs.

ABBEVILLE GENERAL HOSPITAL, *et al.*,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT

A. Statement of the Case

The Boren Amendment of the Medicaid Act[1] mandates that hospitals which operate efficiently and economically be reimbursed reasonably and adequately to meet the costs incurred. 42 U.S.C. § 1396a(a)(13)(A); 42 CFR § 447.253. Since Louisiana elected to participate in

[1] Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., is referred to as the "Medicaid Act."

the Medicaid program it must comply with the Medicaid Act and its implementing regulations. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). The Louisiana Department of Health and Hospitals ("LDHH") is responsible for administering Louisiana's state plan.[2] The Hospitals[3] filed a § 1983 action against LDHH officials seeking relief from LDHH's method and manner of implementing the state plan which they believe ignored the requirements of federal law to the detriment of the Hospitals, the healthcare industry and the citizens of Louisiana.

Federal regulations, promulgated by the Health Care Financing Administration ("HCFA"), grant the states some flexibility in developing Medicaid plans, but federal laws and regulations set forth certain requirements which cannot be ignored. 42 U.S.C. § 1396a(a)(13)(A); 42 CFR § 447.253(a),(b)(1992); *Wilder*, 496 U.S. at 515, 110 S.Ct. at 2520. Each state's plan must establish a reimbursement policy for inpatient hospital services:

> through the use of rates . . . which the State **finds**, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to

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[2] Louisiana Department of Health and Hospital officials named as defendants include David Ramsey, Secretary; Howard Prejean, Assistant Secretary; Christopher Pilley, Undersecretary; Carolyn Maggio, Medical Assistance Manager; and Helene Robinson, Medicaid Program Manager. They are sometimes collectively referred to as LDHH.

[3] Fifty nine hospitals ("Hospitals") originally joined to file this suit.

> provide care and services in conformity with applicable State and federal laws, regulations and quality and safety standards. (emphasis added).

42 U.S.C. § 1396a(a)(13)(A).

Each state Medicaid agency is entrusted by the federal government with the responsibility of making findings and then submitting assurances based on those findings to HCFA that its (1) rates are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated providers; (2) methods and standards take into account the situation of hospitals which serve a disproportionate number of low income patients of special needs; and (3) rates are adequate to assure that recipients have reasonable travel time, to inpatient hospital services of adequate quality. 42 CFR § 447.253(b)(1)(i), (ii)(A), (ii)(C)(1992). These regulations require that findings be made at least annually and that assurances, which guarantee the requirements of federal law are being met, are submitted with every amendment to the established plan. 42 CFR § 447.253(a),(b)(1992).

Louisiana promulgated its Medicaid plan for inpatient hospital services in 1983. The original rates paid were based on each hospital's 1980 or 1981 historical costs. LDHH set these "target rates" without regard to efficiency or economy. Indeed, the State has admitted that initially all hospitals were "deemed" economically and efficiently operated. Pet. App. A, p. 17(a).

In the first few years of operation, LDHH followed the state plan by increasing the rates using HCFA's inflation index. In 1985 and 1986 HCFA assented to the rate freeze proposed by LDHH relying on its assurance that requirements of federal laws and regulations were met.

However, in 1988 after implementing a 2.3% increase in 1987, LDHH again assured HCFA that a freeze of rates was appropriate. This time HCFA disapproved the amendment, unequivocally labelling LDHH's assurances as "unacceptable" and requesting additional information upon which LDHH based its proposed freeze amendment. Information satisfactory to HCFA has not yet been provided.[4] App. A, pp. 1a-5a.

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[4] HCFA, through its Associate Regional Administrator James R. Merryman, originally informed LDHH of HCFA's intention to disapprove the rate freeze as it was unsubstantiated and failed to provide satisfactory assurances that it met the requirements of the Boren Amendment. Information was requested to substantiate the freeze. App. A, p. 1a. A second letter followed which stated: "The additional information you submitted on September 14, 1989 did not adequately address the concerns we expressed in our November 10, 1988 letter . . . you did not provide any information that demonstrates any relationship between these facilities and efficiency and economy." App. A, pp. 2a-3a. A third letter from HCFA's Acting Administrator, Louis B. Hays, finally disapproving the freeze amendment stated in part: "You furnished an assurance statement as required by 42 CFR 447.253(b)(1) that the proposed payment rates are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated providers. However, it is our decision that the assurance is unacceptable. Consequently, the proposed state plan amendment, transmittal number 88-12, is not in accordance with federal statutory requirements of Section 1902(a)(13)(A) of the Act. We believe that the State's assurance does not meet the fundamental requirement of Section 1902(a)(13)(A) of the Act. . . . [T]he State has failed to provide any information or data that demonstrates any relationship between these facilities [which were within the target rates] and efficiency and economy of operations." App. A, pp. 4a-5a.

Despite HCFA's disapproval of the 1988 proposed freeze, the State implemented the freeze and continued it until July 1, 1990. In 1989 LDHH did not file "assurances" with HCFA. Since the 1990-91 fiscal year, target rates have been increased by the applicable HCFA indices. These increases however did not include an adjustment for the "frozen" rates of prior years.

After initiating this suit, the Hospitals filed a motion for partial summary judgment declaring that LDHH failed, as a matter of law, to comply with the Boren Amendment in establishing and amending the Medicaid plan. Specifically, the Hospitals challenged the State's assurances submitted to HCFA, asserting that LDHH failed to make the requisite "findings" that the rates set were reasonable and adequate to meet the costs incurred by efficiently and economically operated hospitals.

LDHH filed a cross motion for summary judgment which the district judge granted. The Hospitals' summary judgment motion was denied and the entire case was dismissed. The Hospitals' motion for new trial was denied with the judge amending his ruling. The Hospitals appealed to the United States Court of Appeals for the Fifth Circuit which resulted in a reversal of the opinion below.

The Fifth Circuit, in a lengthy and well reasoned opinion, concluded that LDHH reduced its finding process:

> to a simple exercise of compilation and assumption, completely ignoring the Congressional mandate that state agencies consider relevant factors such as efficiency, economy, quality of care, and reasonable access. . . . At most, LDHH's "findings" process consisted of reviewing general information regarding the state of

> the economy and the available cost reports. LDHH can point to nothing in the federal Medicaid scheme that permits it to use the general state of the economy as the sole justification for setting rates. Nor is there anything that condones a findings procedure that employs only historical cost data and projected inflation figures. To the contrary, courts have condemned similar schemes. Pet. App. A, pp. 24a-25a.

The Fifth Circuit reversed the district court's grant of LDHH's summary judgment motion and denial of the Hospitals' summary judgment motion, holding that LDHH, as a matter of law, failed to comply in practice with the Boren Amendment's findings requirement.

B. Perceived Misstatements

Petitioners' application for writ of certiorari includes several perceived misstatements of fact and law. Petitioners state several times that LDHH's system of establishing and updating "target rates" acts as an incentive for cost control. Petitioners state that the freezes in rates implemented by the State were justified by a desire to strengthen the State's cost containment incentives. Pet. pp. 4-5. In fact, even the Medicaid program director admitted that in setting target rates there was never an attempt to establish a nexus between efficiency and economy of operations and the target rates. Pet. App. A, p. 17a. The Fifth Circuit also pointed out the failure of Louisiana's plan to include cost containment measures. Pet. App. A, pp. 23a-25a. In a system which does not establish a relationship between efficient and economic operations and the target rates there can be no incentive

to contain costs at all. In Louisiana, if a hospital's costs are below the target rate, the hospital would receive its actual costs rather than the higher target rate. So, to the extent that a facility may have operated inefficiently, it was rewarded to continue that inefficiency. Similarly, if a hospital operates very efficiently but its costs are above the arbitrary rate, it is penalized by receiving payment rates below costs.

In Petitioners' writ application, the statement of the case paints a distorted picture for this Court. Pet. pp. 2-8. For example, Petitioners state that LDHH found it unnecessary to implement certain increases in the target rate because of the State's depressed economy and because the target rates were so high in relation to actual hospital costs that there was little incentive to contain costs. Pet. p. 4. The record is devoid of credible evidence which would support any part of this statement. In fact, the only evidence which Petitioners could possibly rely on in support of this statement would be the affidavits submitted by various LDHH officials. As the Fifth Circuit noted in its opinion, these affidavits were largely discredited by subsequent deposition testimony of LDHH officials. Pet. App. A, pp. 17a-24a. The Medicaid program director neither recommended to her staff nor initiated any efforts to obtain information regarding economic conditions in the State of Louisiana as they may affect hospitals, hospital labor costs, or any other costs that would be reflected in the hospital costs reports. Pet. App. A, p. 22a. Nor did Ms. Robinson recall having access to or using any studies or data base concerning such economic conditions such as the actual cost of medical care in Louisiana. The Fifth Circuit noted in its opinion that Robinson did manage to

review "like weekly things in the newspaper . . . things in magazines and so on regarding, you know, unemployment, drops in personal income, and so on for the state." Pet. App. A, p. 21a. However, Robinson admitted having difficulty obtaining data on Louisiana specific information. *Id.* Further, LDHH cites nothing to support its novel concept that the target rates were so high in relation to actual hospital costs in Louisiana that they felt justified in freezing target rates.

Petitioners also attempt to justify the 1988 freeze which HCFA expressly disapproved. Pet. p. 5. Evidence in the record does not support Petitioners' assertion that HCFA's national cost index was producing target rate increases that were too high for Louisiana, particularly in light of the fact that the state official responsible made no studies or comparisons nor did she direct her staff to do so. Pet. App. A, pp. 21a-22a. As additional justification, Petitioners claim that the 1988 freeze was necessary to strengthen the state plan's cost containment incentives and counteract increasing inefficiency. This presumes that there were cost containment measures in Louisiana's plan, a fact which has never been established, and that there was any inefficiency in a particular Louisiana hospital or the hospital industry as a whole. There were admittedly no studies, no compilation of meaningful data and no analyses performed to determine the relationship between efficiency and economy and whether hospitals met their target rate. Pet. App. A, pp. 17a, n.14.

The Hospitals believe that the facts and LDHH's reaction to HCFA's disapproval of the 1988 freeze show LDHH's attitude toward federal oversight and direction. Unlike the picture painted by Petitioners, several letters

from different HCFA officials were sent to LDHH describing the inadequacy of Louisiana's system. App. A, pp. 1a-5a. One of HCFA's letters states:

> Under your definition, some hospitals are reimbursed their costs while others are not. The definition merely states that 60 percent of the facilities are reimbursed their costs (not that costs are reimbursed up to the sixtieth percentile). You did not provide any information that demonstrates any relationship between these facilities and the efficiency and economy.

In yet another letter, the HCFA administrator noted:

> [Y]ou furnished an assurance statement as required by 42 CFR 447.253(b)(1) . . . However, it is our decision that the assurance is unacceptable . . . We believe that the State's assurance does not meet the fundamental requirement of section 1902(a)(13)(A) of the Act . . . the State has failed to provide any information or data that demonstrates any relationship between these facilities and efficiency and economy of operations. We also believe that the State failed to substantiate its contention that its rates take into account economic conditions that will occur during the rate year. App. pp. 1a-5a.

Satisfactory information has not yet been provided to HCFA which would justify the state's actions.

Not only did LDHH implement the expressly disapproved 1988 freeze, but the State continued the illegal freeze through 1989 with no submission whatsoever to HCFA. This is an express and blatant violation of federal law. Petitioners attempt to justify their actions based on

the fact that they have appealed the 1988 decision. It is astounding that LDHH requested an appeal, has failed to provide satisfactory information to HCFA thus far, has implemented the expressly disapproved plan for several consecutive years and has managed to thwart federal oversight for six years. HCFA has taken no action on the appeal.

Another area of potential misunderstanding surrounds Petitioners' attempt to create a major split in the circuits regarding the standard of review. As is more fully discussed in Section I(B) hereof, there is no significant disagreement in the circuits regarding the standard of review applicable when determining whether a state made findings as required by federal law.

Finally, Petitioners state: "[i]t is undisputed that the responsible state officials at all required times 'found' that the State's rates were reasonable and adequate, and submitted written assurances to that effect to the Secretary." Pet. p. 9. Not only do the Hospitals dispute this statement but do so with support from the deposition testimony of the "responsible" state official, correspondence from HCFA, and the opinion of the Court of Appeals for the Fifth Circuit. Pet. App. A, pp. 17a-19a, 22a-23a; App. A, pp. 1a-5a, Pet. App. A. This Court and many lower courts have unequivocally and consistently reiterated the requirement that the findings process mandates the state to judge the reasonableness of its rates against an "objective benchmark" of an efficiently and economically operated facility. *Wilder*, 110 S.Ct. at 2525-26; *Pinnacle Nursing Home v. Axelrod*, 928 F.2d 1306, 1314-1315 (2nd Cir. 1991); *Temple Univ. v. White*, 941 F.2d 201, 210 (3rd Cir. 1991), *cert. den.*, 112 S.Ct. 873 (1992);

Abbeville Gen. Hosp. v. Ramsey, 3 F.3d 797, 804-807 (5th Cir. 1993); *Illinois Health Care Assoc. v. Bradley*, 983 F.2d 1460, 1465 (7th Cir. 1993); *Amisub (PSL), Inc. v. Colorado Dept. of Soc. Serv.*, 875 F.2d 789, 796 (10th Cir. 1989) *cert. den.* 110 S.Ct. 3212 (1990); *Kansas Health Care Assoc., Inc. v. Kansas Dept. of Soc. and Rehab. Serv.*, 958 F.2d 1018, 1023 (10th Cir. 1992); *Multicare Medical Center v. State of Washington*, 768 F.Supp. 1349, 1391 (W.D. Wash. 1991); *Missouri Health Care Assoc. v. Stangler*, 765 F.Supp. 1413, 1415 (W.D. Mo. 1991). What should be undisputed in this case is that LDHH has never judged the reasonableness of its rates against any sort of objective benchmark of an efficiently and economically operated facility.

SUMMARY OF ARGUMENT

I. The court of appeals' decision correctly determined that LDHH failed to comply with the findings requirement of the Boren Amendment with respect to the challenged agency actions. LDHH's essential position is that once a state agency merely claims to have made findings, its attestations of compliance with federal law should receive a rubber stamp of approval from the federal judiciary. Under this approach, it is difficult to perceive any form of judicial scrutiny of agency findings which LDHH would not consider to be unduly intrusive and unwarranted.

Neither the language of the Boren Amendment, nor any prior decision of this Court, nor any decision by any of the federal circuit courts of appeals supports the proposition that a state agency may comply with the findings

requirement by merely claiming that it has done so. Instead, the court of appeals' determination in this case that the state agency must possess a "minimum quantum of evidence . . . to substantiate its assurances that the reimbursement rates . . . reasonably and adequately meet the costs that must be incurred by efficiently and economically operated hospitals . . . ." *Abbeville*, 3 F.3d at 805, is consistent with both the wording of the statute and existing jurisprudence of this Court and of the federal circuit and district courts. While decisions of various federal circuit courts of appeals and district courts have used differing terminology to describe the showing which a state agency must make to establish that it has engaged in a valid findings process, all such decisions agree that there is a minimum standard which must be satisfied. Furthermore, no case has suggested that once the state agency merely declares that it has complied with federal law, further judicial scrutiny is foreclosed.

Accordingly, the court of appeals' determination that LDHH engaged in nothing more than "**pro forma** compliance with the findings requirement of the Boren Amendment" does not present an issue which warrants review by this Court. As detailed at length in the court of appeals' decision, LDHH offered nothing more than generalized, unsubstantiated and logically inconsistent assumptions as "findings," and can be said not to have truly engaged in a findings process as required by the statute. Contrary to LDHH's arguments, the court of appeals' conclusion that the state agency did not meet the minimum requirements of federal law hardly constitutes an invasion of the agencies rate-making discretion or involvement by the court in the intricacies of the rate-

making process. The court of appeals' decision recognizes that if LDHH would have simply followed federal law in the first instance by engaging in a good faith findings process, it would have been entitled to an appropriate amount of discretion in formulating Medicaid reimbursement rates.

II. This case does not present an appropriate vehicle for reconsideration of *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990); nor is reconsideration of this Court's decision in *Wilder* warranted by any subsequent decision of this Court or the federal circuit courts of appeals. *Wilder* recognized a private cause of action under the Boren Amendment and in favor of health care providers to enforce the substantive requirement that Medicaid reimbursement rates be reasonable and adequate to meet the costs required for operation of efficient and economic hospitals. This case, however, is presently before the Court in connection with the Hospitals' effort to enforce compliance by the state agency with the procedural requirements of the Boren Amendment. Both the majority and the dissenting opinions in *Wilder* recognized that a private cause of action to enforce procedural compliance under the Boren Amendment exists, and LDHH raises no basis for reconsideration of that determination. Furthermore, *Wilder* is distinguishable from this Court's subsequent decision in *Suter v. Artist M.*, 112 S.Ct. 1360 (1992), and LDHH's contention that *Wilder* should be overruled because federal courts are not capable of effectively reviewing state agency compliance with the Boren Amendment is disproved by the consistency and significance of the Boren Amendment cases decided by the federal courts subsequent to *Wilder*.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE BOREN AMENDMENT AND DOES NOT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

A. The Court of Appeals' Decision Is Consistent With the Plain Language of the Statute and this Court's Decision in *Wilder*.

The plain language of the Boren Amendment requires that a state must "**find**[], and make assurances satisfactory to the Secretary" that its rates are reasonable and adequate. Rather than being "contrary to the plain language of the statute," as LDHH argues, the court of appeals' decision upholds the statute by enforcing the requirement of findings. LDHH, on the other hand, invites this Court to treat the statutory requirement of findings as a meaningless formality, which any state can satisfy merely by making a self-serving proclamation that it has made findings. No decision of this Court, or of any circuit court of appeals, supports LDHH's position, which calls not for a plain reading of the statute, but for outright disregard of an express statutory requirement, i.e., the requirement of findings.

LDHH repeatedly culls from this Court's decision in *Wilder* a reference to the Boren Amendment's "bare procedural requirements," 496 U.S. at 513, 110 S.Ct. at 2519, thereby implying that *Wilder* supports its position that

the findings requirement may be satisfied through nothing more than departmental attestations of compliance. When read in proper context, however, the *Wilder* decision's use of the phrase "bare procedural requirements" hardly supports LDHH's position. In considering the issue of whether the statute provides health care providers with a right to enforce the substantive requirement of reasonable and adequate rates, the majority opinion referenced the dissenting opinion's view that "the only right enforceable under [Section] 1983 is the right to compel compliance with these **bare procedural requirements.**" *Id.* (emphasis added). While this comparative reference is interesting because it demonstrates that even the dissenters in *Wilder* recognized a private cause of action for enforcement of procedural rights under the statute, it was hardly offered as a comment on the importance of findings or the standard of judicial review applicable to the findings process, issues not then before the Court.

However, were one to look to the language of the *Wilder* decision for guidance as to those issues, it is apparent that this Court hardly treated the statutory requirement of findings as inconsequential. In fact, the *Wilder* decision rejected the position of the United States, as amicus curiae, that "the statute requires only that a State provide assurances . . . and that assurances do not give rise to enforceable rights," for the reason that:

> This interpretation ignores the language of the statute that requires a State to **find** that its rates are "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities" and to assure that

> eligible individuals have "reasonable access" to services. . . . The requirement that a State make such a finding is a necessary pre-requisite to the subsequent requirement that the State provide "assurances" to the Secretary. . . . Moreover, the Secretary's interpretation of his role under the statute – that he will review the reasonableness of the assurances presented by a State rather than the findings themselves – is based entirely on his understanding that a State has the responsibility to **find** that its rates are adequate before making assurances to the Secretary.
>
> *Id.* at 513, n. 11 (emphasis by the Court).

Given that this Court's decision in *Wilder* describes the findings process as a "necessary prerequisite" to any reimbursement plan, and as the "responsibility" of the state, there is no support for LDHH's contention that *Wilder* is inconsistent with the court of appeals' decision in this case. Instead, the court of appeals' determination that the findings requirement has true meaning and requires a "factfinding process" that generates a "minimum quantum of evidence" is legally and logically consistent with *Wilder*'s determination that the statutory requirement of findings evidences Congressional intent to provide a cause of action in favor of health care providers, not only to enforce procedural compliance with the Boren Amendment, but also to enforce the substantive requirement of states to provide reasonable and adequate rates.

After all, this Court reasoned in *Wilder* that "[a]ny argument that the requirements of findings and assurances are procedural requirements only and do not

require the State to adopt rates that are actually reasonable and adequate is nothing more than an argument that the State's findings and assurances need not be correct," and rejected that argument because "it would render the statutory requirements of findings and assurances, and thus the entire reimbursement provision, essentially meaningless." *Id.* at 513, 514. Similarly, if the court of appeals' decision in this case that the findings requirement requires a "factfinding process" and a "minimum quantum of evidence" is wrong, as LDHH argues, then the findings requirement would be rendered meaningless because all that would be needed for compliance is the State's mere attestation that it has made findings. *Wilder* does not remotely sanction such an approach.

Citing *Webster's Third New International Dictionary*, LDHH defines the term "find" as "to arrive at (a conclusion)" or to "determine and declare (as a verdict in a judicial proceeding)." Relying on these definitions, LDHH appears to contend that a state may satisfy the findings requirement by mere declaration; once the declaration is made, it is not subject to judicial scrutiny. Yet even LDHH would acknowledge the right of health care providers to bring suit if the state outright refused to make findings. What then of a case where the state **claims** to have made findings, but cannot substantiate them in any meaningful way (i.e., this case)?

LDHH seemingly contends that the **claim of compliance** blocks judicial scrutiny, but the court of appeals

correctly declined to adopt that view in this case.[5] For if the claim of compliance alone blocks judicial scrutiny, then in reality there is no findings requirement, and the "plain language" of the statute, to use LDHH's phrase, is eviscerated. Rather, as the court of appeals held in this case, the law does not permit "such a **pro forma** compliance with the findings requirement of the Boren Amendment."

LDHH also incorrectly characterizes the court of appeals' decision as "entailing intrusive **de novo** review of a wide range of rate-related matters." There is a distinct difference between the court of appeals telling LDHH that it did not do **nearly enough** by way of findings, as opposed to dictating to LDHH the manner in which findings should be made and rates set. The court

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[5] If it is not LDHH's position that the findings requirement may be satisfied by the state's mere claims of compliance, then it is difficult to ascertain how, as a practical matter, courts would measure compliance under the "arbitrary and capricious" standard advocated by LDHH. LDHH repeatedly criticizes the court of appeals' determination that a "minimum quantum of evidence" is necessary to support findings, yet if there is no minimum threshold for sufficiency of evidence of compliance, how can the standard of review be anything but **pro forma**, or totally dependent upon the state's mere claim of compliance? If the test for compliance is not to be governed solely by the state's claim of compliance, then what sort of review would LDHH permit? Probably none, for it is difficult to imagine any judicial determination that a promulgated finding is inadequate which LDHH would not characterize as an unwarranted invasion of agency discretion. The true bottom line of LDHH's position is that once the State claims that it has made findings, **there is no room for judicial review of any kind**.

of appeals engaged in the former process, but not the latter.

LDHH has been instructed by the court of appeals that it must do something more than make reference to generalities gleaned from newspapers about the state economy as a basis for freezing rates, that it must do something more than arbitrarily presuming that hospitals are or are not "efficient and economic" based upon a target rate that concededly has no connection to efficiency and economy of operations, and that it must do something more than engage in sweeping assumptions about hospital costs based upon incomplete and generalized cost data. The court of appeals' decision, however, does not purport to dictate or specify the additional steps LDHH must take in making findings, thus allowing for flexibility and an appropriate degree of deference for the rate making process.

Instead, the Fifth Circuit's decision simply and unambiguously instructs LDHH to take the statutory findings requirement seriously, and to stop belittling that requirement by claiming to have engaged in a meaningful fact-finding process when in fact it obviously has not. Faced with the court of appeals' instruction that it comply with federal law, LDHH now asks this Court to take away a reviewing court's authority to so instruct good faith agency compliance with the Boren Amendment. If in fact the authority of federal courts to engage in such review were to be taken away, the findings requirement would become meaningless indeed.

B. There Is No "Confusion" in the Courts of Appeals Over the Findings Requirement.

LDHH seizes upon the court of appeals' reference in a footnote to "bedlam" among the circuit courts on the issue of standard of review applicable to **substantive compliance** with the Boren Amendment as a basis for arguing that there is "confusion" among the courts of appeals on the standard of review applicable to **procedural compliance** with the statute. In reality, there is neither "bedlam" nor "confusion" among the circuits as to the standard of review applicable to procedural compliance – the issue presented by this case – but consistency. As the court of appeals observed, "[w]hether LDHH complied with the procedural requirements of the Boren Amendment is a question of law, subject to **de novo** review. . . . On this point most opinions are clear." *Abbeville*, 3 F.3d at 802. **See, e.g.**, *Amisub (PSL), Inc. v. Colorado Department of Social Services*, 879 F.2d 789, 795 (10th Cir. 1989), **cert. denied**, 496 U.S. 935 (1990); *Mississippi Hospital Association, Inc. v. Heckler*, 701 F.2d 511, 516 (5th Cir. 1983); *Multicare Medical Center v. Washington*, 768 F. Supp. 1349, 1389 (W.D. Wash. 1991); *Folden v. Washington State Dep't of Social & Health Services*, 744 F. Supp. 1507, 1532 (W.D. Wash. 1990), **aff'd**, 981 F.2d 1054 (9th Cir. 1992).

The principle supporting **de novo** review of a state's procedural compliance with the Boren Amendment is as simple as it is compelling: when a state agency makes a proclamation that it has complied with federal law, it is not engaging in a specialized or regulatory function of the kind traditionally afforded deference by federal

courts. Instead, the agency is reporting to the federal government that it believes it has complied with the mandates of federal law. The process cannot stop there. There is no rational basis for providing deference to a state agency's attestation that it has complied with federal law. *Erie County Geriatric Center v. Sullivan*, 952 F.2d 71, 79 (3rd Cir. 1991). **De novo** review by federal courts is necessary to insure uniformity in the interpretation of federal law, and to prevent the delegation of that inherent power of the federal judiciary to fifty different state agencies.

Indeed, in exercising **de novo** review of Boren Amendment procedural requirements, the federal circuit courts have arrived at remarkably uniform conclusions on the issue of **the minimum steps** that a state agency must take with respect to the findings requirement of the Boren Amendment. The language used by various courts to describe what constitutes sufficient findings varies. In *Folden*, 744 F.Supp. at 1532, the court required a "reasonably principled analysis." In *Pinnacle*, 928 F.2d at 1314, the court required a "nexus" between reimbursement rates and efficiently and economically operated hospitals. In *Amisub*, 879 F.2d at 796, the court required findings which identify and determine efficiently and economically operated hospitals, the costs that must be incurred by such hospitals and payment rates which are reasonable and adequate to meet such costs.

As the Fifth Circuit recognized in this case, however, the differing terminology used in these decisions is directed toward solving the same inquiry: "what is the minimum quantum of evidence that an agency must possess in its cognition to substantiate its assurances that the

reimbursement rates . . . reasonably and adequately meet the costs that must be incurred by efficiently and economically operated hospitals. . . . " *Abbeville*, 3 F.3d at 805. Essentially the same inquiry was made in *Illinois Health Care Ass'n v. Bradley*, 983 F.2d at 1462-63, where the court of appeals stated that it was reviewing the state plan "with the deference accorded federal agency actions" because the challenged plan provisions were the product of "state and federal agency action," but nevertheless found that the state had failed to "make findings that establish a nexus between the costs of operating [efficient and economic] facilities and its reimbursement rates." *Id.* at 1467.

The approaches taken in these various federal court of appeals decisions reveal that there is no true conflict among the circuits on the issue of sufficiency of findings, as all pertinent cases take the position that there must be, in the Fifth Circuit's words, a "minimum quantum of evidence" to substantiate that an agency's assurances that its plan and any proposed amendments will reasonably and adequately meet the costs that must be incurred by efficiently and economically operated hospitals. While different cases use different terminology to ask the question of whether that minimum quantum of evidence is present, it is most significant that **all of the cases, whether describing their review process as "de novo" or otherwise, do in fact ask the question.** LDHH's position is that the question should not be asked at all, and that judicial review should be foreclosed once the state agency says that it has made findings. Not a single case, even among those decisions which expound at length upon the importance of agency discretion, supports that position.

Ironically, LDHH complains that the court of appeals does not provide a specific definition of the "minimum quantum of evidence" necessary to constitute adequate findings. A rigid definition or formula for what constitutes a finding, however, would defeat the very flexibility in plan formulation for which LDHH argues in other contexts. The court of appeals' decision strikes an appropriate balance by not attempting to limit what a state agency may do when engaging in the findings process, while at the same time making clear what it may not do, i.e., it may not treat that process as a meaningless formality by claiming to make findings that have no reasonable basis.

C. The Court of Appeals' Decision is Not Contrary to the Principle That Courts May Not Impose Procedural Requirements On Agencies.

In responding to LDHH's contention that the court of appeals has unduly imposed its own requirements upon the state's system of Medicaid reimbursement, it is important to clarify what the court of appeals decision does **not** do. The court of appeals' decision does not dive into the complexities of Medicaid reimbursement methodology or substitute its judgment as to such methodology for that of the state agency. The court of appeals' decision does not attempt to limit or restrict the manner in which the state agency may make findings or seek to establish a nexus between its chosen method of reimbursement and the requirements of the statute. The court of appeals' decision does not attempt to lessen the traditional deference afforded to state agency action once the requirements of federal law have been met. And the court

of appeals' decision does not impose any procedural requirement upon LDHH other than the basic and unavoidable requirement that the agency comply with the mandates of the Boren Amendment.

On the other hand, what the court of appeals' decision **does do** is to review the superficial, arbitrary and illogical explanations offered by LDHH as "findings," and reject those explanations as insufficient to meet the requirements of federal law. This case is not an example of judges seeking to "engraft[] their own notions of proper procedures upon agencies entrusted with substantive functions by Congress," as LDHH suggests (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 525 (1978)), but is instead an example of a federal court decision which appropriately constrains a state agency from ignoring federal law. It is consistent and comports with the House Report which essentially provides that states should be given latitude regarding the development and implementation of reimbursement methodologies that **promote the efficient and economical delivery of such services**. H.R. Rep. No. 158, 97th Cong., 1st Sess. 293 (1981). (emphasis added)

II. RECONSIDERATION OF THIS COURT'S DECISION IN *WILDER* IS NOT WARRANTED.

Wilder held that health care providers have a private cause of action to enforce the Boren Amendment's substantive requirement that the state pay rates reasonable and adequate to meet the requirements of the statute. Even if this Court were inclined to reconsider that holding, this case is hardly the appropriate vehicle for such

reconsideration, at least insofar as the present phase of the litigation is concerned. The Fifth Circuit's decision is limited to the issue of procedural compliance with the Boren Amendment (except to the extent that the Fifth Circuit recognized that the district court erred in dismissing both the procedural and substantive challenges contained in the Hospitals' Complaint). Even the dissenting opinion in *Wilder* recognized that health care providers should have the right to enforce procedural compliance with the statute:

> Section 1396a(a)(13)(A) establishes a procedure for establishing such rates of reimbursement. The first step requires the States to make certain findings. The second and only other step requires the States to make certain assurances to the Secretary and the Secretary – not the courts – to review those assurances. Under the logic of our case law, respondent arguably may bring a [Sect.] 1983 action to require that rates be set according to that process.

496 U.S. at 527 (Rehnquist, J., dissenting)

This action is precisely the kind referred to above in the *Wilder* dissent – an action to require that rates be set according to the findings requirement. The Hospitals' separate challenge to substantive rates has not yet been reached, and perhaps will not be reached if they prevail on the issue of procedural compliance. In any event, the case does not present itself in the correct posture for reconsideration of *Wilder*.

Nor is reconsideration of *Wilder* warranted by this Court's intervening decision in *Suter v. Artist M.*, 112 S.Ct. 1360 (1992). As the majority in *Suter* recognized, that

case was distinguishable on its facts from *Wilder*. A comparison of the provisions of the Boren Amendment and the statute at issue in *Suter*, the Adoption Assistance and Child Welfare Act of 1980, is an apples and oranges comparison. This Court found that the former statute contained statutory language evidencing Congressional intent to confer an enforceable right upon health care providers, while the latter statute did not contain similar language in favor of private individuals.

LDHH also takes the convenient position that *Wilder* should be overruled in order to deprive federal courts of any authority whatsoever to enforce the Boren Amendment, ostensibly for the reason that issues pertaining to Medicaid reimbursement are too complicated for the judiciary. Yet this argument is belied by what has actually happened to date in decisions such as *Amisub, Folden, Illinois Health Care Ass'n, Mississippi Hospital Ass'n, Pinnacle* and this case. These decisions have drawn an appropriate balance between the deference rightfully afforded to state regulatory decisions and the need to assure uniform compliance with the minimum requirements of federal law.

For LDHH to argue that "judicial enforcement of the Boren Amendment has enmeshed lower federal courts in the minutiae of Medicaid rate-making activities, an area where they have little if any expertise" is to trivialize the careful analysis and thorough efforts employed by circuit courts across the country as they have sought to uphold the guarantees of the statute while respecting state autonomy to the extent reasonably possible. And for the federal courts to abandon the function of assuring Boren Amendment compliance would be an abandonment of

not only the rights of the health care providers, but ultimately of the rights and needs of health care recipients.

CONCLUSION

The court of appeals' determination that LDHH has failed to comply with the minimum requirements of federal law under the Boren Amendment is not in conflict with any statute, with any prior decisions of this Court nor with the decision of any court of appeals from any circuit. Very simply, this case is about a state agency which sought inappropriately to find a short-cut around the requirements of federal law. The Fifth Circuit appropriately threw up a roadblock, and the case should now proceed in the district court in a manner consistent with the court of appeals' ruling. LDHH's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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